INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Chicago, R. I. & P. Ry. Co. v. *Commissioner*, 47 F. (2d) 990, certiorari denied, 284 U. S. 618	9
Helvering v. *Kehoe*, 309 U. S. 277	7
Textile Mills Corp. v. *Commissioner*, 314 U. S. 326	9
Statutes:	
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 22	13
Sec. 23	13
Sec. 291	13
Sec. 293	14
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 22	14
Sec. 23	14
Sec. 291	14
Sec. 293	14

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 92

MURRAY HUMPHREYS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 345–373) is reported in 42 B. T. A. 857. The opinion of the Circuit Court of Appeals (R. 410–414) is reported in 125 F. (2d) 340.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1942 (R. 415), and a petition for rehearing denied on February 18,

1942 (R. 416). The petition for a writ of certiorari was filed on May 18, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the decision of the Board of Tax Appeals that the petitioner received certain items of unreported income is supported by substantial evidence; and whether that evidence supports the imposition of the penalties involved.

2. Whether deductions claimed for automobile expenses were properly disallowed for lack of proof that they were in fact incurred; or if incurred, whether they were in any event ordinary and necessary expenses in carrying on a legitimate trade or business.

3. Whether there was any error in receiving and considering evidence that the taxpayer was regarded as a racketeer and gangster.

4. Whether, after rendering its decision, the Board erred in denying the taxpayer's motion for leave to present additional testimony.

STATUTES INVOLVED

The statutes involved herein are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

This case involves income taxes for the years 1930, 1931, and 1932. The facts, as found by the Board of Tax Appeals (R. 346–351), may be summarized as follows:

The taxpayer, a native of Chicago, in 1928 and 1929, together with others, was engaged in selling beer and had a one-fourth interest in, and managed, a restaurant where beer and liquor were sold. This business terminated in 1929 (R. 346–347). In 1930 and 1931 the taxpayer had some connection with the General Market House, from which he received $1,500 and $1,300 in those years. The record does not disclose the nature of this connection or of any services rendered (R. 347).

After a meeting in 1929, attended by representatives of various cleaning and dyeing establishments in Chicago, the taxpayer in 1930 received $10,000 by weekly contributions for furnishing protection from molestation to such establishments (R. 347–348). One such establishment which discontinued its payments in 1930 received threats from one of the taxpayer's associates; its plant was thereafter broken into and clothing damaged by acid or some chemical to the extent of $20,000. The other cleaners increased their payments so that the taxpayer received the full amount agreed upon (R. 348).

In 1931 the taxpayer was gratuitously made a part owner of the New Drexel Cleaners (R. 348–

349). That partnership interest was worth $5,000 (R. 360). In addition he received weekly payments totaling $2,600 in 1931 and $5,200 in 1932 (R. 349).

During the years involved the taxpayer maintained a bank account at the Sears Community State Bank, in the name of M. L. Brunswick, in which there were deposits of $29,812.82 in 1931 and $52,776.81 in 1932, of which $480 and $2,662.52 represented returned checks redeposited in 1931 and 1932, respectively.

In 1931 one Robert G. Fitchie, president of the Milk Wagon Drivers Union, was kidnapped in Chicago. He was released upon the payment of $50,000 ransom, which was left in an automobile and taken by the taxpayer on December 23, 1931 (R. 349).

The taxpayer never filed any income-tax return prior to 1932. After employing an accountant he filed a 1931 return on March 15, 1932, and also filed a return for 1930 and prior years on April 5, 1932 (R. 349). These were based upon figures obtained from cancelled checks, bank records, some of which were in fictitious names, and monies expended during those years (R. 349–350). The Board found that the 1930 return was not filed within the required time and that it was not shown that the delay was due to reasonable cause and not due to wilful neglect [1] (R. 350–351). The tax-

[1] See Sec. 291 of Revenue Act of 1928 (Appendix, *infra*, pp. 13–14).

payer's 1932 return was prepared by a different accountant from information furnished by the taxpayer. On this return a deduction was claimed for "Business Auto Expense" in the amount of $2,526 (R. 350). On the 1928 and 1929 returns the taxpayer stated his occupation or business as "Restaurant" (R. 349). For 1930 it was stated as "Inspector"; for 1931, "Superintendent"; and for 1932, "Executive" (R. 350). These returns reported incomes of $10,360, $25,380, and $20,800 for the years 1930, 1931, and 1932, respectively (R. 322–323, 350–352). In June 1933 the taxpayer was indicted on, and entered an unconditional plea of guilty to charges of wilfully attempting to evade income taxes upon incomes of $20,360 for 1930, $88,712.82 for 1931, and $60,489.50 for 1932, which included all the items mentioned above which are involved in this proceeding. The Board found that the deficiencies herein are due to fraud with intent to evade tax[2] (R. 351).

The principal issues before the Board were whether petitioner in fact had received the various items detailed above and whether they constituted unreported income. The Board found that petitioner had received the amounts in controversy and that they constituted unreported income; in particular, it found that he owned the Brunswick

[2] See Sec. 293 (b) of Revenue Act of 1932 (Appendix, *infra*, p. 14).

bank account, that the amounts deposited therein were income to him, and that he had received the $50,000 ransom (R. 358–372). It further held that the alleged automobile expenses which were based upon the taxpayer's estimate were correctly disallowed for lack of substantiation, and that it was not shown that they were incurred in any legitimate business (R. 372). The Board also sustained the 25-percent delinquency and 50-percent fraud penalties (R. 372–373). The Board's findings and opinion were filed on October 8, 1940 (R. 345). A motion for rehearing and motion for leave to present additional testimony were filed on November 7, 1940 (R. 379–387), and denied on December 18, 1940 (R. 3). On January 27, 1941, the Board entered its decision with respect to the deficiencies and penalties involved herein (R. 387), and its decision was affirmed by the court below (R. 410–414).

ARGUMENT

I

This case presents neither a conflict of decisions nor any question of general importance. The main question is simply whether the findings of the Board are properly supported by the record.

The evidence in support of the deficiencies and penalties sustained by the Board is fully summarized in the Board's findings of fact and opinion (R. 346–373). Such evidence was care-

fully reviewed by the court below, which stated (R. 414):

> We have, however, considered the evidence and experience no difficulty in determining that there was substantial evidence to sustain the Board's findings.

The decision is in accord with *Helvering* v. *Kehoe,* 309 U. S. 277. The record shows that the taxpayer and his associates received the $10,000 in 1930 for furnishing "protection" or on account of his influence with the unions (R. 51–53, 87, 96–97, 102). It was permissible for the Board to find from this evidence that the taxpayer was the principal in the transaction and received the entire amount, although he claimed to have received only $5,000 from those who acted as his intermediaries in collecting the money. The Board was entitled to draw its own conclusions as to petitioner's credibility.

The taxpayer admitted that he received an interest in the Drexel Cleaners, which was valued at $5,000 (R. 51–54, 57–58), in addition to $5,000 in cash (R. 125, 139, 257, 313). The evidence also fully sustains the conclusion that the taxpayer owned the "M. L. Brunswick" bank account in which income was deposited in 1931 and 1932 (R. 94, 107–109, 112, 330–339, 343); the signatures in that account had a strong similarity to the taxpayer's signatures (R. 343), and checks on this account were used for payment of a Lincoln car

for Mary Humphreys (R. 155–158). Although it is true that there was a conflict in the testimony as to the ownership of this account, there were presented to the Board sharp issues of credibility, and petitioner's principal witness in this connection had previously made flatly contradictory statements on this very question.

The evidence also shows that the taxpayer received the $50,000 ransom. The record shows that there was a kidnapping of a union official, at the point of a gun, who was released only after demands for, and the payment of, $50,000 in $100 bills, which the evidence shows was received by the taxpayer accompanied by other persons (R. 183–187, 192–197, 203–207, 316, 370). This item also was included in the indictment to which the taxpayer pleaded guilty (R. 79, 168–169, 225–227). He testified that he knew he was charged with this ransom in connection with publicity regarding the indictment (R. 308).

II

The disallowance of the alleged business expenses for gasoline, oil, garage, and service, and depreciation of a 16-cylinder Cadillac automobile (R. 50) was proper because the taxpayer did not establish that he was engaged in any legitimate trade or business. Moreover, the amounts claimed were not substantiated (R. 372). Section 23 (a) (Appendix, *infra,* p. 13) has been held inappli-

cable to activities which are contrary to public policy. *Chicago, R. I. & P. Ry. Co.* v. *Commissioner,* 47 F. (2d) 990 (C. C. A. 7th), certiorari denied, 284 U. S. 618. Cf. *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, 337–339. The taxpayer testified that he did not have much of any business (R. 47), and that he did not know anything about the dry-cleaning business and took no part in its management (R. 58). He stated that his 1932 income was not from a business but from a salary, in connection with which he used his Cadillac automobile every day (R. 50). However, the only use of an automobile in securing any of the income in question, as shown by the record, was with respect to the trailing of the witness Sumner and securing of the $50,000 ransom (R. 193–197, 203–207).

III

There likewise is no error in connection with the admission or consideration of evidence that the taxpayer was regarded as a gangster and racketeer (Pet. 6–7; Br. 9). The taxpayer claimed that he was furnishing protection to an industry in "turmoil" with a "cleaning war" (R. 52–53, 56, 67–68). He stated that Oslan had been "one of the antagonizers in the industry" (R. 53), in which other associates died violent deaths (R. 54). He admitted that he was "hanging around * * * and they were selling beer" in 1928 (R. 66). He

stated on redirect examination that he had been indicted on a charge of conspiring to restrain trade (R. 83); and, on recross-examination, that he used to talk to Al Capone and that there was a friendly feeling with the Capone organization (R. 87). When a fugitive from justice, in connection with the tax-evasion indictment, the taxpayer sent word by Frank Nitti, who was connected with the "old Capone syndicate," that he wanted to surrender (R. 163). His own attorney, during cross-examination of the witness Sumner, brought out that "racketeering is an octopus" (R. 200, 214) and a reference to the taxpayer and others as "birds" or "racketeers" (R. 215). He also developed that the taxpayer and another individual "got a flock of guns" (R. 285). His cross-examination of the witness John H. Lyle also brought forth testimony regarding efforts to drive out "gangsters" and "hoodlums" like Mr. Humphreys (R. 315, 320, 321). The taxpayer admittedly carried a gun at one time (R. 307). His own brother stated that the taxpayer's name became so notorious that the brother changed his name (R. 253).

The evidence with respect to the taxpayer's activities and reputation during the taxable years obviously had a direct bearing upon whether or not he was engaged in any legitimate business, and the questions of receipt of unreported income and deductibility of the alleged business expenses. In

view of all the foregoing evidence the testimony of the police officer, John I. Howe, that the taxpayer's general reputation was that of a gangster and racketeer (R. 284), could not have been prejudicial. The record shows that the taxpayer came fully within the modern definitions of these terms.[3]

IV

There was no error in denying the taxpayer's motion for leave to present additional testimony. As shown by the Statement, *supra*, p. 6, the motion was filed some time after the Board's findings and opinion were entered. The taxpayer then apparently sought an opportunity to produce and have one Leventhal testify regarding the M. L. Brunswick bank account (R. 114, 385–386). The record shows that as early as January 22, 1937, the taxpayer knew of the Commissioner's position with respect to this account, when he denied that it represented his income (R. 7, 19). There was some evidence that Leventhal owned, or had an interest in, this account (R. 114). The record also shows that Leventhal had been available at Chicago some three weeks before the hearing but had left and gone to Florida. The hearing extended

[3] See Webster, New International Dictionary (2d ed.), and Funk & Wagnalls New Standard Dictionary (1937), "racketeer" and "gangster." Funk & Wagnalls states that a racketeer is one who engages in bootlegging, beer-running, or other illegal occupations; one who terrorizes legitimate business by threat or violence to obtain control or to collect graft.

from January 17 to January 24, 1939 (R. 2), and there apparently was no attempt to secure Leventhal as a witness after the hearing started. The taxpayer, apparently for his own reasons, failed to take any steps to call Leventhal until the case had been heard and decided against him. The Board did not abuse its discretion in refusing to reopen the case in these circumstances.

CONCLUSION

The decision below is correct. There is presented neither an important question of law nor a conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

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